IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-785

ANN PEACHES, Petitioner

v.

CITY OF EVANSVILLE, INDIANA
JOHN ZIRKELBACH, Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

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CITATIONS

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

The Respondents, the City of Evansville, Indiana, and John Zirkelbach respectfully pray that this Court deny issuance of a Writ of Certiorari to the Court of Appeals of Indiana, thereby refusing to review the decision entered by that Court in these proceedings.

OPINION BELOW

The opinion of the Indiana Court of Appeals is reported at _____ Ind. App. _____, 389 N.E. 2d 322 (1979), and appears in Appendix A to this Brief. The opinion of the Indiana Court of Appeals denying Petitioner's petition for rehearing is reported at _____ Ind. App. _____, 391 N.E. 2d 828 (1979) and appears in Appendix B to this Brief. The order of the Indiana Supreme Court denying Petitioner's petition to transfer appears in Appendix C to this Brief.

STATEMENT OF THE CASE

Petitioner filed her complaint in the Vanderburgh Superior Court of Vanderburgh County, Indiana on March 26, 1979. Petitioner filed an amended complaint on February 17, 1975. (See Appendix D). (The following facts appear in the Record of Proceedings filed in the Court of Appeals of Indiana).

Walter Peaches, Jr. died in the early morning on October 11, 1973. On October 11, 1973, Officer John Zirkelbach was a junior police officer assigned to the motor patrol in a uniform squad car. On that evening Officer Zirkelbach and his partner, John Althoff, received a signal one (1) which indicated there was a crime in progress. The dispatcher advised Officer Althoff by telephone that there was a break-in in progress at the Out of Site Lounge several blocks away. The signal one (1) was given at 3:25 a.m. The Out of Site Lounge is a business establishment operating as a night club. A break in at such a business place would have been classified as a second degree burglary. On October 11, 1973 there was a BOL (be on the look out for) a vehicle involved in an armed robbery in Evansville that morning. The armed robbery BOL indicated that the persons were armed. At the time officers Zirkelbach and Althoff arrived at the Out of Site Lounge they saw a car like the one in the BOL report. After seeing the car officer Zirkelbach thought that there could be people inside the Out of Site Lounge who were armed. The police officers arrived on the scene without sirens or lights. It is normal when a burglary or crime is in progress to try and sneak up on the situation. Officer Althoff told Officer Zirkelbach to "Watch yourself. There's the car."

After letting Officer John Althoff out of the car, Officer Zirkelbach proceeded across the sidewalk, lot, and stopped the police car half way across the sidewalk and halfway to the street. After stopping the car Officer Zirkelbach got out of the car and saw two (2) suspects come

out of a gang way between a house and the Out of Site Lounge and run west. It was dark at all times. Officer Zirkelbach pursued the suspects west on the sidewalk. Officer Zirkelbach was carrying a shotgun. The suspects ducked into a grass lot between the Out of Site Lounge and some houses and businesses and disappeared. As they were running in front of the Out of Site Lounge Officer Zirkelbach yelled for them to stop. After the two people ducked into the lot and reappeared they ran west on a sidewalk. At that time Officer Zirkelbach yelled again at the suspects and they kept going whereupon he shot at them. Officer Zirkelbach did not run after them after they reappeared. The suspects disappeared into a dark area in which Officer Zirkelbach was shooting. The suspects again came out running at a full speed. Officer Zirkelbach lost sight of the two people as they ran down the street. The last time Officer Zirkelbach saw them they were still running and had disappeared into the darkness. Afterwards another suspect jumped out of the upstairs vent window of the Out of Site Lounge and Officer John Althoff fired at him. Officer Zirkelbach heard noise from the rear of the Out of Site Lounge, saw a third subject running from the back of the Out of Site Lounge and fired at him with his revolver. The third person disappered. Officer Zirkelbach reloaded his handgun and pursued the third suspect on foot. While looking for the suspects Officer Zirkelbach ran into Officer Joe Wolfe. After meeting Officer Wolfe a call for assistance was made. Eight (8) to ten (10) policemen ultimately arrived on the scene. After surveying the damage in the Out of Site Lounge Officer Zirkelbach proceeded west on Canal Street to look for the other two suspects.

Officer Zirkelbach heard some noise to the rear of a car as he approached and Peaches fell off the back of the car onto the sidewalk. Peaches was laying on the sidewalk and appeared to be bleeding, Officer Zirkelbach yelled to some officers to call an ambulance.

Officer Zirkelbach yelled for the fleeing suspects to

stop before firing the shotgun from his shoulder. The record reveals the following exchange at trial between Petitioner's counsel and Officer Zirkelbach:

> "Q. Officer when you shot at these two people what was your intention?
> "A. To apprehend them. To stop them.
> "Q. Did you shoot at them to kill them or to wound?
> "A. To apprehend.
> "Q. If that meant killing them that is what you were intending to do?
> "A. Yes, sir. That is one way of putting it." (P. 497, lines 18-25, Record of Proceedings, Indiana Court of Appeals).

Police regulations do not allow warning shots. The use of a firearm is allowable only when all other means available to effect the lawful purpose intended to be accomplished fail or will not succeed. The use of a firearm is a last resort.

The following statute was in effect at the time of the shooting incident:

Indiana Code 35-1-19-3

> "If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary mens to effect the arrest." (Since repealed by the Indiana Acts of the General Assembly of 1976, P.L. 148, § 24, effective October 1, 1977)

REASONS FOR DISSALLOWANCE OF THE WRIT

I.

UNITED STATE SUPREME COURT IS LIMITED TO REVIEW CASES THAT INVOLVE FEDERAL QUESTIONS ONLY.

28 U.S.C. § 1257, in part, reads as follows:

> "§ 1257. State courts; appeal; certiorari Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .
>
> . . .(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The jurisdiction of the Supreme Court to review the proceedings of a State Court is not of a general reviewing Court on appeal, but is limited to the specific instance of denial of federal rights. *Waters-Pierce Oil Co. of Texas* (1909), 212 U.S. 86, 53 L. Ed. 417, 29 S. Ct. 220.

Unless the case involves a federal question, the judgment therein is not reviewable in the Supreme Court. *Hunter Co. v. McHugh* (1943), 320 U.S. 222, 88 L. Ed. 789, 65 S. Ct. 459.

It must appear from the record that a real and substantial federal question was involved and the decision of the State Court on the federal question was necessary to its determination of the cause.

The Supreme Court has adhered to the principal that it will not review judgments of state courts which rest upon adequate and independent state grounds or non-federal grounds. *Herb v. Pitcain* (1945) 324 U.S. 117, 89 L. Ed. 789, 65 S. Ct. 459.

Petitioner presents two alleged questions. Said questions read as follows:

> 1. Whether the refusal of a state court to apply the Federal Rules of Evidence in an action brought pursuant to 42 U.S.C. § 1983 constitutes a denial of Equal Protection and Due Process under the Fourteenth Amendment, and, further, violates the Constitution of the United States, Article 6 [2] by making state law "supreme" over federal law.
>
> 2. Is the Federal Constitution violated by a state statute which permits a police officer to use deadly force against a fleeing felon, who has not used deadly force in the commission of the felony and whom the officer does not reasonably believe will use deadly force against the officer, or others, if not immediately apprehended?

From the opinion of the Indiana Appellate Court in this case it is shown that the court did not decide a federal question but correctly decided a tort action. For this reason, this court should not accept a Petition for Writ of Certiorari.

A.

THE FEDERAL RULES OF EVIDENCE ARE NOT APPLICABLE TO STATE COURT PROCEEDINGS.

Rule 101, Federal Rules of Evidence, states:

> "These rules govern proceedings in the courts of the United States and before United States magistrates, to the extent and with the exceptions stated in Rule 1101."

Rule 1101, Federal Rules of Evidence, states, in part:

> "*These rules apply to the United States District Court,* the District Court of Guam, the District Court of the Virgin Islands, the District Court for the District of the Canal Zone, the United States Court of Appeals, the Court of Claims and to United States Magistrates, in the actions, cases and proceedings and to the extent hereinafter set forth . . . (emphasis added)"

The Court of Appeals in its opinion, page 18, paragraph 2 of the respondents' Appendix A stated:

> "The next issue concerns whether the trial court erred in denying a motion by Peaches to use the Federal Rules of Evidence. Peaches argues since she was attempting to establish a federal claim under 42 U.S.C. § 1983, her federal rights could only be fully protected by the use of the Federal Rules of Evidence. Peaches then directs us, without citation of supporting authority, to certain excluded testimony which would purportedly have been admissible under the Federal Rules. Likewise, Peaches cites no direct autho-

rity for the proposition that the F.R.E. must govern. Nevertheless, we find it difficult to believe that our rules of evidence are so restrictive as to deprive citizens of their right to have a full and fair opportunity to vindicate federal rights in the forums of this State. Moreover, Indiana courts are not among those "federal" courts for whom the Federal Rules of Evidence are deemed applicable. F.R.E. 101, 1101. The trial court's denial was not in error."

As set out in *Durley*, supra, review by the Supreme Court of a State court decision requires that it be shown

(1) That the State court actually decided a federal question, and
(2) That decision of the federal question was necessary to the State's court's determination of the cause.

The case before this Court does not qualify under said requirements. Where it is clear, as it is here, that the highest state court having jurisdiction to hear the federal question presented, and where the decision of the State court finally determines the issue on a state ground and not on a federal ground, this court should not undertake to review it. If the independent state ground is a sufficient or substantial one, it should be presumed that the State court did not base its decision of the federal question. *Durley v. Mayo* (1956), 351 U.S. 277, 100 L. Ed. 1178 76 S. Ct. 806. There can be no doubt that the Indiana Court of Appeals based its decision on a dispositive state ground, substantially, and sufficiently. No federal question is even recognized as existing in the opinion of the Indiana Appellate Court. Inasmuch as question number one raised in Petitioner's Petition for Writ of Certiorari has been adequately answered on state grounds under interpretation of state law, her

petition should not be allowed.

B.

INDIANA COURT OF APPEALS DID NOT DECIDE THE QUESTION OF THE CONSTITUTIONALITY OF I.C. 35-1-19-3

The Court of Appeals in its opinion, page 18, paragraph 1 of the respondents' Appendix A stated:

> "We decline to reach the merits of Peaches' constitutional challenge for the reason that we are of the opinion Zirkelbach was justified in relying on the presumptive constitutionality of the statute in issue. In related contexts, our courts have held that as a theoretical matter, unconstitutional statutes are void from their inception; as a practical matter, however, statutes have a *semblance* of validity which will protect good faith actions thereunder. See *Saloom v. Holder*, (1973) 158 Ind. App. 177, 304 N.E. 2d 217; *Ulrich, etc. v. Beatty, etc. et al.*, (1966) 139 Ind. App. 174, 216 N.E. 2d 737. As such, we believe Zirkelbach's conduct was properly adjudged in light of statutes in effect at the time of the alleged tort and upon which he relied in good faith. Therefore, our resolution of the constitutional claim would be a fruitless exercise."

The Court of Appeals in its opinion, page 24, paragraph 1 of the respondents' Appendix B stated:

that this court did not reach the merits of various alleged grounds for error with respect to the issue as to whether the trial court erred in failing to declare IND. CODE 35-1-19-3 unconstitutional. Our reason for not doing so was based on our decision that regardless of the merits of Peaches's claim, Officer Zirkelbach was entitled to rely on the presumptive validity of the statute in issue. Hence, as the issues were formulated below and on appeal, the constitutionality of the statute was moot. As such, it was unnecessary for us to address the other alleged grounds for error. Again, this conclusion is based on the premise that Zirkelbach was entitled to assume the statute was constitutional, a premise that we here reaffirm. See *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213 (1967); *Landrum v. Moats*, 576 F. 2d 1320 (8th Cir. 1978), *cert. denied*, 99 S. Ct. 282.

The Indiana statute in effect at the time of the incident allowed a police officer to use force if a defendant flees or forcibly resists after being apprised of the intention to arrest. Other states have held a statute similar to the one in question to be constitutional. *Cunningham v. Ellington* (1971), 321 F. Supp. 1072 held Tennessee's deadly force statute, almost identical to Indiana Statute, was not unconstitutionally vague. *Wiley v. Memphis Police Department* (1977) 548 F. 2d 1247, Cert. denied 434 U.S. 822 54 L. Ed. 2d 78, 98 S. Ct. 65, held that the Tennessee statute did not discriminate against fleeing felons on the basis of race and violation of equal protection of the 14th Amendment. The Court stated that no basis had been shown to motivate a racial policy and in fact both black and white fleeing felons had been shown to have been fired upon by police as a matter of last resort where arrest could not

reasonably be accomplished otherwise.

Petitioner cites no case wherein the court has held a deadly force statute to be unconstitutional. *Mattis v. Schnarr* (1975) 404 F. Supp. 643, rev. on other grounds 542 F. 2d 1007, vacated on grounds no case or controversy existed 47 U.S. 171, 52 L. Ed. 2d 219, 97 Sup. Ct. 1739, appears to be the only Court which has ever held such a statute unconstitutional. The *Wiley* Court, supra recognized this by stating:

> "The 8th Circuit is the only Court to our knowledge which has ever held that such a statute, which is so necessary even to elementary law enforcement is unconstitutional. It extends to the felon unwarrented protection at the expense of the unprotected public.
>
> "We agree with the dissent in the 8th Circuit case *Mattis v. Schnarr*, which was highly critical of the majority opinion for not following the decisions of other circuits and for embarking on a new course which should have been left to the State Legislature where it belongs." 458 F. 2d at 1255.

In this case, the Indiana Court of Appeals specifically declined to decide the constitutionality of I. C. 35-1-19-3. Based on independent non-federal grounds, the Court held the conduct of Officer Zirkelbach to be "properly adjudged in light of statutes in effect at the time of the alleged tort and upon which he relied in good faith."

Respondents submit petitioner has failed to cite authority to support her contention that I.C. 35-1-19-13 is unconstitutional as a matter of law. The issue of the constitutionality of I.C. 35-1-19-13 was not addressed by the Indiana Court of Appeals and therefore cannot properly be the subject of a Petition for Writ of Certiorari.

II.

PETITIONER WAS NOT HARMED BY THE APPLICATION OF THE INDIANA RULES OF EVIDENCE

Petitioner does not cite a case which holds a state court is required to apply the Federal Rules of Evidence in an action based, in part, on 42 U.S.C. § 1983.

In *Mondou v. New York N.H. & H.R. Company* (1912), 223 U.S. 1, 32 S. Ct. 169, 56 L. Ed. 327 the Supreme Court was concerned *solely* with the Federal Employers Liability Act, and therefore, the case is not authority for application of the F.R.E. in an action based, in part on tort, as well as on 42 U.S.C. § 1983.

In *Kansas City Southern Railroad v. Lesley* (1914), 112 Ark. 305, 167 S.W. 83, rev'd on other grounds, 238 U.S. 599, S. Ct. 844, 59 L. E. 1478, an FELA case, it is stated:

> "It is a well established rule that actions in the state court to enforce rights given by a federal statute, the rules of evidence of the state court must control unless otherwise provided by federal law. Wigmore on Evidence, 15" 167 S.W. at 92.

The use of the Indiana rules did not place the state in a supreme position over the federal government. The court in every way provided a forum to litigate the substantive federal law. Petitioner was not denied due process nor equal protection of the law. Petitioner was not discriminated against. Any person filing a similar cause of action in a state court would have been subject to the Indiana Rules of Evidence. Only by filing the case in a federal court would plaintiff have been entitled to application of the federal rules of evidence.

Further, petitioner has failed to show harm as a result of the Trial Court's ruling. Indiana courts have stated it is harmless error to exclude evidence, which, if received would not have changed the outcome of the litigation. *American Emp. Ins. Co. v. Cornell* (1948) 225 Ind. 559, 76 N.E. 2d 562, *Sutherland v. Cleveland, C.D. & St. L.R. Co.* (1897) 148 Ind. 308, 47 N.E. 624. Error in exclusion of evidence is harmless where the party offering it could not have prevailed in any case. *Gilson v. City of Anderson* (1967) 141 Ind. App. 180, 226 N.E. 2d 921. In filing the cause of action in the Indiana state court, petitioner submitted to the use of the Indiana Rules of Evidence. The application of Indiana Rules of Evidence was proper and was not harmful to plaintiff.

CONCLUSION

Wherefore, Respondents respectfully submit that petitioner's alleged issues have been adequately disposed of pursuant to state grounds and that her Petition for Writ of Certiorari should be disallowed.

Respectfully Submitted,

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APPENDIX A

(OPINION AND JUDGMENT OF THE INDIANA COURT OF APPEALS)

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Court of Appeals

IN THE

COURT OF APPEALS OF INDIANA

FIRST DISTRICT

ANN PEACHES,	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 1-878-A-223
	)	
CITY OF EVANSVILLE, IN	)	
JOHN ZIRKELBACH,	)	
Defendants-Appellees.	)	

APPEAL FROM THE GIBSON CIRCUIT COURT
The Honorable Walter H. Palmer, Judge

ROBERTSON, J.

Plaintiff-appellant Ann Peaches (Peaches) appeals a negative judgment in favor of defendants-appellees City of Evansville (City) and John Zirkelbach (Zirkelbach).

We affirm.

Peaches brought an action in three counts for the wrongful death of her son, Walter Peaches, Jr. (Walter) alleging, *inter alia*, negligent hiring of Zirkelbach by the City, negligence on the part of Zirkelbach in the shooting death of Walter, and deprivation of Walter's civil rights under 42 U.S.C. § 1983. Walter was fatally shot by Zirkelbach, a police officer for the City, when attempting to flee from the scene of a second degree burglary. At the close of the evidence, the trial court gave the following instruction:

> If you find from a preponderance of the evidence that Officer Zirkelbach reasonably believed and had probable cause to believe that Walter Peaches was fleeing apprehension for a felony, gave a warning to Walter Peaches of his intention to arrest, and fired at the deceased upon a reasonable belief the shooting was necessary to effect his capture as a last resort, you may find that Officer Zirkelbach was justified in the use of deadly force.
>
> You are further instructed that if Officer Zirkelbach acting in his official capacity as a police officer of the City of Evansville, did, in fact, have probably cause to believe that Walter Peaches had committed a felony on the morning in question, and further that Officer Zirkelbach exhausted all possible means to apprehend Walter Peaches without the use of deadly force and, in fact, used deadly force only as a last resort to apprehend Walter Peaches, after giving notice of his intention to arrest Walter Peaches, you may find that Officer Zirkelbach was justified under law, to use deadly force.

Peaches contends the giving of this instruction was error on the *sole ground* that it established an incorrect standard of conduct because the statute upon which it was based, *IND. CODE* 35-1-19-3,[1] is constitutionally infirm for the reason that it offends the Due Process Clause of the Fourteenth Amendment. The argument proceeds on the assumption that an unconstitutional statute is void *ab initio;* hence, assuming the statute infringes upon due process guarantees, Peaches asserts that Zirkelbach's conduct cannot be ad-

1 For present law, *See* IC 35-41-3-3.

judged in accordance therewith.

We decline to reach the merits of Peaches's constitutional challenge for the reason that we are of the opinion Zirkelbach was justified in relying on the presumptive constitutionality of the statute in issue. In related contexts, our courts have held that as a theoretical matter, unconstitutional statutes are void from their inception; as a practical matter, however, statutes have a *semblance* of validity which will protect good faith actions thereunder. *See Saloom v. Holder*, (1973) 158 Ind. App. 177, 304 N.E. 2d 217; *Ulrich, etc. v. Beatty, etc., et al.*, (1966) 139 Ind. App. 174, 216 N.E. 2d 737. As such, we believe Zirkelbach's conduct was properly adjudged in light of statutes in effect at the time of the alleged tort and upon which he relied in good faith. Therefore, our resolution of the constitutional claim would be a fruitless exercise.

The next issue concerns whether the trial court erred in denying a motion by Peaches to use the Federal Rules of Evidence. Peaches argues that since she was attempting to establish a federal claim under 42 U.S.C. § 1983, her federal rights could only be fully protected by the use of the Federal Rules of Evidence. Peaches then directs us, without citation of supporting authority, to certain excluded testimony which would purportedly have been admissible under the Federal Rules. Likewise, Peaches cites no direct authority for the proposition that the F.R.E. must govern. Nevertheless, we find it difficult to believe that our rules of evidence are so restrictive as to deprive citizens of their right to have a full and fair opportunity to vindicate federal rights in the forums of this State. Moreover, Indiana courts are not among those "federal" courts for whom the Federal Rules of Evidence are deemed applicable. F.R.E. 101, 1101. The trial court's denial was not in error.

Peaches next alleges error in the trial court's refusal to permit the testimony of one Ludwig to the effect that Zirkelbach, while off duty, had fired three shots into a van after the van had knocked over some garbage cans in front

of his residence. This incident occurred over two years *after* the shooting death of Walter. Peaches contends it was admissible in her case-in-chief since it was relevant as "subsequent conduct." The essence of this argument, although couched in various conceptual constructs, is that this incident showed a predisposition or tendency to use deadly force unreasonably. Or, stated differently, Peaches sought to introduce the evidence to show other negligent acts by Zirkelbach as tending to prove that he was negligent in the shooting of Walter. The trial court correctly ruled, however, that Peaches had failed to establish a foundation consisting of similar conditions surrounding both occurrences. Courts are naturally reluctant in a negligence action to admit evidence of other negligent conduct because of the inevitable injection of collateral matters which would unduly hamper the fact-finding process. Thus, the proponent of such evidence must lay a firm foundation of similar circumstances to ensure that the probative force of the proferred testimony will outweigh the injection of extraneous matters. *See generally McCormick's Handbook on Evidence* § 200 (1972). This Peaches failed to do.

Alternatively, Peaches contends that this evidence was admissible to impeach by contradiction Zirkelbach's testimony that he had never used deadly force against a misdemeant. First, a witness may not be impeached by specific bad acts which have not been reduced to a conviction. *Swan v. State*, (1978) Ind., 375 N.E. 2d 198. Second, impeachment evidence to contradict is admissible only if it could have been introduced in the case-in-chief, i.e., collateral matters are improper for contradiction. *Lee v. State*, (1976) Ind. App., 349 N.E. 2d 214; *Bryant v. State*, (1973) 261 Ind. 172, 301 N.E. 2d 179. As noted above, the evidence was not proper in Peaches's case-in-chief; therefore, it would not have been proper for impeachment purposes. We also note that remoteness in time could have served as a sufficient basis to exclude testimony in the exercise of the trial court's discretion. *Shaw v. Shaw*, (1973)

159 Ind. App. 33, 304 N.E. 2d 536. The evidence was properly excluded.

Peaches next alleges error in excluding testimony to the effect that he told his mother, "They shot me down like a dog", soon after the shooting incident in issue.[2] It is well settled that we will not reverse a trial court's rejection of evidence unless the evidence is vital to the case and was erroneously refused. *Auto-Teria, Inc. v. Ahern*, (1976) Ind. App., 352 N.E. 2d 774. Again, the test for relevancy is a minimal one; however, relevant evidence may properly be excluded where its probative force is outweighed by its tendency to arouse the emotions of the jury. *Smith v. Crouse-Hinds Company*, (1978) Ind. App., 373 N.E. 2d 923. We confess our inability to discern the relevancy of such testimony to any matter vital to Peaches's case. Moreover, the inflammatory nature of the statement is abundantly clear. Hence, we do not believe the trial court demonstrated an abuse of discretion in excluding the proferred testimony.

Peaches next asserts error in the trial court's denial of her challenge for cause of Timothy Goad during voir dire. Mr. Goad indicated that he favored the defense because he knew the "hassles" police go through. He also stated that if he had a choice he would require Peaches to prove her case beyond a reasonable doubt. Nevertheless, he answered affirmatively to questions propounded by the court to the effect that he would base a decision solely on the evidence introduced at trial, would follow the court's instructions (including proof by a preponderance), and would weigh the credibility of each witness. After reading the record

2 Although the issue is framed as error in the granting of a motion in limine directed to the statement, the grant or denial of such a motion generally occasions no error; rather, it is the admission or exclusion of the evidence at trial which is subject to review. *Marsh v. Lesh*, (1975) 164 Ind. App. 67, 326 N.E. 2d 626.

in this particular, we are satisfied that Mr. Goad was sufficiently impressed with and understood his duty as a juror. As in a criminal case, we think the denial of a challenge for cause should be reviewable only for an abuse of discretion. *See, e.g., Stevens v. State*, (1976) 265 Ind. 396, 354 N.E. 2d 727; *Riggs v. State*, (1976) 264 Ind. 263, 342 N.E. 2d 838. No abuse has been shown.

Peaches next alleges error in the admission of certain business records relating to Walter's term of employment at the Executive Inn. We presume that these records were offered on the issue of damages. It is axiomatic that in addition to establishing error in the admission of evidence, the complaining party must also demonstrate harm or prejudice. *Ashley v. City of Bedford*, (1974) 160 Ind. App. 634, 312 N.E. 2d 863. Since Peaches did not prevail on the issue of liability, error, if any, has not been shown to be harmful since the evidence went only to the issue of damages.

Peaches next alleges error in refusing to give the following tendered instruction:

> You are instructed that at the time of this incident there was in force a statute in Indiana which reads as follows:
>
> "If, after notice of the intention to arrest the defendant, he either flees or forcible resists, the officer may use all necessary means to effect the arrest."
>
> If you find by a preponderance of the evidence that at the time and place of the incident in question the defendant violated the above and foregoing statute, without any justification or legal excuse therefor, and that such violation proximately caused the incident and damages complained of, and if the defendants have not proved their affirmative defense, then I instruct

you that the plaintiff, Ann Peaches, can recover and you may return a verdict for her.

Peaches contends she was entitled to this instruction because a violation of the aforementioned statute would be negligence *per se*. We disagree for the reason that in order for a violation of a statute to be negligence *per se*, the statute must prescribe an absolute duty, *i.e.*, the jury need not consider the surrounding circumstances in determining whether the actor exercised reasonable care. *Board of Commissioners of Miami County v. Klepinger,* (1971) 149 Ind. App. 377, 273 N.E. 2d 109. The above statute, however, does not impose an absolute duty irrespective of the particular facts and circumstances. The phrase "the officer *may* use all *necessary* means" clearly requires a factual inquiry into the surrounding circumstances and thus falls far short of establishing an absolute duty which will justify liability regardless of the facts accompanying the officer's conduct. As such, the refusal was not error.

Peaches next contends it was error to instruct the jury that a police officer may presume that a statute or regulation is constitutional. *See Wiley v. Memphis Police Department,* 548 F.2d 1247, 1251 (6th Cir. 1977), *cert. denied,* 434 U.S. 822. We have already stated that Zirkelbach's standard of conduct should be considered in the light of his legitimate reliance on such a presumption and thus need not consider this contention further.

Lastly, we decline the invitation to judicially abrogate the long standing rule in this state that the measure of damages for the wrongful death of a child does not extend beyond the age of majority.

Finding no reversible error, the trial court is in all respects, affirmed.

Affirmed.

Lowdermilk, P. J. and Lybrook, J., concur.

APPENDIX B

(OPINION AND ORDER OF THE INDIANA COURT OF APPEALS DENYING REHEARING)

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FILED
Marjorie H. O'Laughlin
June 5, 1979
Clerk of the
Indiana Supreme and
Court of Appeals

IN THE

COURT OF APPEALS OF INDIANA

FIRST DISTRICT

ANN PEACHES,	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 1-878-A-223
	)	
CITY OF EVANSVILLE, IN	)	
JOHN ZIRKELBACH,	)	
Defendants-Appellees.	)	

APPEAL FROM THE GIBSON CIRCUIT COURT
The Honorable Walter H. Palmer, Judge

PETITION FOR REHEARING

ROBERTSON, J.

Petitioner Ann Peaches (Peaches) correctly asserts that this court did not reach the merits of various alleged grounds for error with respect to the issue as to whether the trial court erred in failing to declare *IND. CODE* 35-1-19-3 unconstitutional. Our reason for not doing so was based on our decision that regardless of the merits of Peaches's claim, Officer Zirkelbach was entitled to reply on the presumptive validity of the statute in issue. Hence, as the issues were formulated below and on appeal, the constitutionality of the statute was moot. As such, it was unnecessary for us to address the other alleged grounds for error. Again, this conclusion is based on the premise that Zirkelbach was entitled to assume the statute was constitutional, a premise that we here reaffirm. *See Pierson v. Ray*, 386 U.S. 547,

87 S.Ct. 1213 (1967); *Landrum v. Moats*, 576 F. 2d 1320 (8th Cir. 1978), *cert. denied*, 99 S. Ct. 282.

The petition for rehearing is in all respects denied. Lowdermilk, P. J. and Lybrook, J., concur.

APPENDIX C

(ORDER OF THE INDIANA SUPREME COURT DENYING TRANSFER)

IN THE

SUPREME COURT OF INDIANA

ANN PEACHES, Plaintiff-Appellant,	)	
vs.	)	Court of Appeals No. 1-878 A 223
CITY OF EVANSVILLE, IN JOHN ZIRKELBACH, Defendants-Appellees.	)	

Appellant's Petition to Transfer DENIED.

Hunter, A.C.J.
ALL Justices Concur.
21st day of September, 1979

APPENDIX D

STATE OF INDIANA)
) SS:
COUNTY OF VANDERBURGH)

IN THE VANDERBURGH SUPERIOR COURT

ANN PEACHES	)	
vs.	)	No. 74-CIV-840
CITY OF EVANSVILLE, IN JOHN ZIRKELBACH	)	Vanderburgh Superior Court FILED Feb. 17, 1977 Shirley Jean Cox, Clerk

AMENDED COMPLAINT

COUNT I

Plaintiff complains of the defendants, and each of them, and for Count I of her claim herein says:

1. That she is the natural mother and guardian of Walter Peaches, Jr., a minor, who died on the 11th day of October, 1973, a resident of Vanderburgh County, Indiana.

2. That at all times material, the defendant, John Zirkelbach, was a police officer employed by the City of Evansville, Vanderburgh County, Indiana, and was an agent acting within the scope of his authority.

3. That on or about the 11th day of October, 1973 the defendant, John Zirkelbach, an agent of the defendant, City of Evansville, Indiana, with a reckless disregard for his rights, shot and killed the said Walter Peaches, Jr.

4. That the defendant, City of Evansville, Indiana is liable herein both under the doctrine of *respondeat superior* and because it negligently hired and retained the defendant,

John Zirkelbach, when it knew, or in the exercise of reasonable caution should have known, that he was psychologically unfit to be a police officer of said city.

5. That the death of plaintiff's son has caused her to lose his services and incur expenses incident to his death.

6. That the said acts of the defendants proximately caused the death of decedent and plaintiff's damages.

7. That on or about the 4th day of December, 1973, notice of plaintiff's claim was forwarded by certified mail to Russell Lloyd, Mayor of the City of Evansville; John Cox, Corporate Counsel for the City of Evansville; and William Middleton, City Clerk for the City of Evansville, a copy of said notice is marked Exhibit "A", attached hereto and made a part of this complaint.

WHEREFORE, plaintiff prays for judgment against the defendants in a sum sufficient to compensate for the injuries, pain and suffering incurred by decedent, expenses incurred as a result of the decedent's death and pecuniary damages suffered by plaintiff as a result of decedent's death, costs of this action, and all other proper relief.

COUNT II

Plaintiff complains of the defendants, and each of them, and for Count II of her claim herein says:

1. That she adopts by reference rhetorical paragraphs 1, 2, 3, 4, 5, 6 and 7 of Count I of her amended complaint.

2. That the acts of defendants complained of above were willful and oppressive to the extent that plaintiff is entitled to punitive damages.

WHEREFORE, plaintiff prays for judgment of punitive damages against the defendants in the amount of $25,000.00, costs of this action and all other proper relief.

COUNT III

Plaintiff complains of the defendant, John Zirkelbach, and for Count III of claim says:

1. That she adopts by reference rhetorical paragraphs 1, 2, 3, 4, 5, 6 and 7 of Count I of her amended complaint.

2. That in the commission of said acts, complained of above, John Zirkelbach acted wrongfully, wantonly, knowingly, purposely, and with the specific intent to deprive plaintiff's decedent of his right to freedom from physical injury and death, these rights being secured by the provisions of the Eighth, Ninth and Fourteenth Amendments to the United States Constitution and by 42 U.S.C. § 1983.

WHEREFORE, plaintiff prays for judgment against the defendant, John Zirkelbach, in a sum sufficient to compensate for the injuries, pain and suffering incurred by decedent, expenses incurred as a result of the decedent's death and pecuniary damages suffered by plaintiff as a result of decedent's death, costs of this action, and all other proper relief.

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